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No. 97-577

In the Supreme Court of the United States

OCTOBER TERM, 1997

D. L. BAKER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

Whether the National Labor Relations Board correctly determined that petitioner was bound by the terms of a prehire agreement with the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 105 F.3d 647 (Table). The decision and order of the National Labor Relations Board (Pet. App. 11a-15a) and the decision and recommended order of the administrative law judge (Pet. App. 16a-54a) are reported at 317 N.L.R.B. 335.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1997. A petition for rehearing was denied on June 11, 1997 (Pet. App. 9a-10a). The time for filing a petition for a writ of certiorari was extended to

September 30, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. To accommodate "the uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry," *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 266 (1983), Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), authorizes an employer engaged in that industry to enter into a collective bargaining agreement with a union that has not established its majority status within the relevant bargaining unit. Such agreements are known as "prehire" contracts. Section 8(f) also permits an election challenge at any time to the representative status of a union that is a party to such a contract, whether or not the contract itself is still in effect.

In 1971, the National Labor Relations Board (Board) held that an employer's unilateral repudiation of a prehire agreement did not violate the statutory bargaining obligations of Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), unless the complaining union could demonstrate its majority status. *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694 (1971), reversed and remanded *sub nom. Local No. 150, Int'l Union of Operating Engineers* v. *NLRB*, 480 F.2d 1186, 1188-1191 (D.C. Cir. 1973). In *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335 (1978) (*Higdon*), this Court upheld that general policy and sustained the Board's more specific determination that the Act forbids picketing by a minority union to enforce a prehire agreement that the employer refuses to honor, because the picketing "effectively has

the object of attaining recognition as the bargaining representative," notwithstanding the lack of a showing of majority support. *Id.* at 341. The Court found that the Board's position—that a prehire agreement is "voidable" and "does not have the same stature as a collective-bargaining agreement" until and unless the contracting union "attains majority support in the relevant unit"—was "an acceptable reading of the statutory language," even though it was "perhaps not the only tenable" construction of the Act. *Ibid.*

Subsequently, in *McNeff*, the Court held that an employer's obligations under a prehire contract with a minority union are enforceable in an action under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, if the employer had "never manifested an intention to void or repudiate the contract" before the Section 301 action was filed. 461 U.S. at 270-271. The Court explained: "The concerns with the § 7 rights of employees to select their own bargaining representative and our fidelity to Congress' intent that prehire agreements be voluntary—and voidable—that led to our decision in *Higdon* are not present in this case. Union enforcement, by way of a § 301 suit, of monetary obligations incurred by an employer under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent." *Id.* at 269. The Court found it unnecessary to decide "what specific acts would effect the repudiation of a prehire agreement—sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or * * * precipitating a representation election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support." *Id.* at 270 n.11. The Court held, however,

that mere covert noncompliance with the agreement was insufficient to relieve the employer of its contractual obligations. See *id.* at 263-264, 270.

b. In *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987) (*Deklewa*), enforced *sub nom. International Ass'n of Bridge Workers* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), the Board overruled its earlier position—adopted in *R.J. Smith* and upheld in *Higdon*—that an employer has a unilateral right to repudiate a prehire agreement with a union that has not acquired majority status. Section 8(f), the Board explained, requires striking a reasonable balance between protecting employee free choice and maintaining industrial stability in the construction industry. Based on its detailed analysis of the effects of the *R.J. Smith* rule, the Board concluded that it could best strike that balance by holding that neither party to a voluntary prehire agreement may unilaterally repudiate it until the agreement expires or the unit employees vote to reject or change their bargaining representative. *Id.* at 1379-1389.

Every court of appeals that has considered the validity of the *Deklewa* rule on the merits has upheld it as a reasonable construction of the Act. See *C.E.K. Indus. Mechanical Contractors, Inc.* v. *NLRB*, 921 F.2d 350, 356-357 (1st Cir. 1990); *International Ass'n of Bridge Workers* v. *NLRB*, 843 F.2d 770, 776-780 (3d Cir.), cert. denied, 488 U.S. 889 (1988); *NLRB* v. *Bufco Corp.*, 899 F.2d 608, 611 (7th Cir. 1990); *NLRB* v. *W.L. Miller Co.*, 871 F.2d 745, 747-748 (8th Cir. 1989); *Mesa Verde Constr. Co.* v. *Northern California Dist. Council of Laborers*, 861 F.2d 1124, 1131-1134 (9th Cir. 1988) (en banc); *NLRB* v. *Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1394-1395, 1397 (10th Cir. 1992)

(en banc); see also *Local No. 150, Int'l Union of Operating Engineers* v. *NLRB*, 480 F.2d 1186, 1188-1191 (D.C. Cir. 1973) (disapproving Board's pre-*Deklewa* holding in *R.J. Smith*); note 3, *infra*. See generally *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996) (Board is due "considerable deference" in "develop[ing] national labor policy through interstitial rulemaking") (internal citation omitted).

2. In July 1976, union electrician Daniel Baker incorporated his own business as D.L. Baker, Inc., which appears as petitioner in this case. Pet. App. 13a, 27a-28a. In October 1976, petitioner's president executed certain "me too" documents—a letter of assent and a benefit fund agreement—binding petitioner to the terms of a "master agreement" between a multiemployer bargaining association (the Association) and Local 26, International Brotherhood of Electrical Workers (the Union). See *id.* at 6a-7a & n.4, 13a, 27a-30a. The letter of assent authorizes the Association to act as the employer's bargaining agent and provides that that authorization shall remain in effect until petitioner terminates it by giving written notice to the Association and the Union at least 150 days "prior to the then current anniversary date" of the master agreement. *Id.* at 29a. Similarly, the benefit fund agreement provides, by its terms, that it will remain in effect from "year to year until either party gives written notice to the other of a decision to terminate the agreement according to the provisions in the Letter of Assent." *Ibid.*; see also *id.* at 7a n.4.

At the interview during which the "me too" documents were executed, Baker led the Union to believe that his business was still a sole proprietorship and that he intended to perform all the work himself, at least for the time being. Pet. App. 27a-28a.

Baker thereafter promised that, when he began hiring employees, he would notify the Union and secure referrals from the union hiring hall, as required by the master agreement. *Id.* at 13a, 29a-30a. Although Baker himself stopped paying union dues in 1977 and was suspended from union membership in 1978, neither he nor petitioner gave notice of any intent to terminate petitioner's obligations under the self-renewing "me too" documents. *Id.* at 30a-31a, 48a-49a. Nor did Baker or petitioner notify the Union when petitioner began hiring employees in disregard of its hiring hall obligations. *Id.* at 29a, 31a, 46a-49a. In 1993, after discovering that petitioner was advertising for employees in violation of the master agreement, the Union unsuccessfully asked petitioner to adhere to that agreement and to recognize the Union as bargaining representative. *Id.* at 31a, 49a.

3. The Union filed unfair labor practice charges with the Board. An administrative law judge (ALJ) determined that petitioner had bound itself to the master agreement; that it had failed to comply with the notice requirements of the termination provisions in the "me too" documents; and that it had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by violating the terms of the current master agreement and by refusing to recognize the Union as the bargaining representative of its employees. Pet. App. 12a-13a, 28a-31a, 48a-49a.[1] The Board adopted the ALJ's recommended order. *Id.* at 14a-15a, 51a-54a.

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[1] The ALJ specifically rejected many factual arguments that petitioner repeats here as though they were not resolved against it. Compare Pet. 4-7 with Pet. App. 28a, 36a-39a. The Board and the ALJ also determined that petitioner had engaged in a variety of other unfair labor practices (see Pet.

4. In an unpublished per curiam decision, the court of appeals affirmed the Board's unfair labor practice findings and enforced its order. Pet. App. 1a-8a. The court rejected petitioner's contention that "by sixteen years of 'notorious' nonunion operations" it had repudiated its obligations under the master agreement between the Association and the Union. *Id.* at 6a. The court acknowledged that the ALJ had decided the Section 8(f) issue under *Deklewa*, but, on the ground that the Fourth Circuit "has not adopted *Deklewa*," it analyzed the case under its own pre-*Deklewa* precedent of *Clark* v. *Ryan*, 818 F.2d 1102, 1107 (4th Cir. 1987). Pet. App. 6a n.3.[2] The court held that, under *Clark* and *McNeff*, a Section 8(f) prehire agreement is binding until repudiated and that "acts sufficient to repudiate the prehire agreement require at least that the Union have some form of notice of the inconsistent conduct." *Id.* at 6a. The court found such notice absent here because, as the ALJ had found, petitioner had succeeded in operating nonunion without detection by the Union until 1993, and there was no reason for the Union to suspect earlier that "Baker was reneging on his promises." *Ibid.*; see also *id.* at 43a, 46a-47a. In sum, the court concluded, "we must reject [petitioner's] argument that its conduct prior to September 1993 was sufficiently 'notorious' to repudiate the contract." *Id.* at 6a.

The court also held that petitioner "was bound to the current § 8(f) agreement by virtue of renewal

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App. 12a n.2, 17a-26a), but those determinations are not at issue here.

[2] The court noted that it would have reached the same result if it had applied the distinct analysis set forth in *Deklewa*. Pet. App. 6a n.3.

clauses contained in both 'me-too' documents, as well as in each § 8(f) agreement." Pet. App. 7a & n.4 (footnote omitted) (citing *Local 257, Int'l Bhd. of Elec. Workers* v. *Grimm*, 786 F.2d 342, 345-346 (8th Cir. 1986); *NLRB* v. *Black*, 709 F.2d 939, 940-941 (5th Cir. 1983); *Nelson Elec.* v. *NLRB*, 638 F.2d 965, 967-968 (6th Cir. 1981)). Finally, the court agreed with the Board that petitioner was bound by the "me too" documents that petitioner's president had executed, even though she had signed in the name of Baker's sole proprietorship. *Id.* at 8a n.5.

ARGUMENT

As the court of appeals correctly observed (Pet. App. 6a n.3), the ALJ—and, in adopting the ALJ's opinion, the Board—decided this unfair labor practice case under the Board's 1987 decision in *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, enforced *sub nom. International Ass'n of Bridge Workers* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988). See Pet. App. 32a-35a (applying *Deklewa* and its progeny). As discussed above, *Deklewa* holds that an employer (or a union) that is party to a prehire agreement violates Section 8(a)(5) of the Act (or its union analogue, Section 8(b)(3)) if it unilaterally repudiates that agreement before it expires or the unit employees oust the union as their bargaining representative. 282 N.L.R.B. at 1379-1389. *Deklewa* thus overruled the Board's earlier *R.J. Smith* rule (see p. 2, *supra*) permitting unilateral repudiations of prehire agreements. That earlier rule had been the subject of, and the foundation for, this Court's decisions in *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350 (1978) (*Higdon*),

and *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983). See pp. 2-3, *supra*.

Petitioner's essential claim—that it was entitled to repudiate its agreement with the union by disregarding its contractual obligations—rests on the tacit premise that this case should be decided under the pre-*Deklewa* regulatory regime at issue in *McNeff*. Similarly, the court of appeals decisions that petitioner cites in support of its position (see, *e.g.*, Pet. 10-14) also applied pre-*Deklewa* law. Those same courts have also recognized, however, that *R.J. Smith* has been overruled and that *Deklewa* represents a substantial but permissible change in the Board's implementation of Section 8(f). See, *e.g.*, *Mesa Verde Constr. Co.* v. *Northern California Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc); *NLRB* v. *W.L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989); *NLRB* v. *Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1392-1394 (10th Cir. 1992) (en banc); cf. *Sheet Metal Workers Local Union No. 54* v. *E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1472 n.8 (5th Cir. 1993) (holding that *Deklewa*, if valid, is not retroactive), cert. denied, 510 U.S. 1117 (1994); see generally pp. 4-5, *supra*.[3]

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[3] Although this Court upheld the *R.J. Smith* rule in *Higdon* and further addressed some of the consequences of that rule in *McNeff*, the Court also recognized that the rule, while "acceptable," was "perhaps not the only tenable" construction of the Act. *Higdon*, 434 U.S. at 341. As the courts of appeals that have addressed the validity of *Deklewa* have recognized, this Court's approval of *R.J. Smith* did not preclude the Board from reconsidering its own precedent in this area or from replacing *R.J. Smith* with what the Board, based on its empirical judgment, has found to be a more reasonable implementation of Section 8(f). See generally *NLRB* v. *J. Weingarten*,

Because petitioner's claim is based on a pre-*Deklewa* body of law that is neither applicable to this case nor of continuing practical significance, that claim is unworthy of this Court's review. First, *Deklewa* unambiguously compels the result that the court of appeals reached here. Under *Deklewa*, petitioner had no unilateral right to repudiate its contractual obligations with the Union. Thus, its repudiation of those obligations, no matter how "overt" (see Pet. i (questions presented)), was an unfair labor practice under Section 8(a)(5).[4] Because the Board

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Inc., 420 U.S. 251, 265-266 (1975); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984); compare *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-537 (1992) (where statute "speaks to [an] issue" under step one of *Chevron*, agency is bound by court's determination of statute's "clear meaning"). In *Industrial TurnAround Corp.* v. *NLRB*, 115 F.3d 248 (1997), a panel of the Fourth Circuit held that it was bound by considerations of *stare decisis* to apply pre-*Deklewa* circuit precedent, but it held open the possibility that that court could approve *Deklewa* if it considers the issue en banc, as the Ninth Circuit did in *Mesa Verde*. See *id.* at 254-255; see also *Local Union 48 Sheet Metal Workers* v. *S.L. Pappas & Co.*, 106 F.3d 970, 975 (11th Cir. 1997) (similar approach in Section 301 context). The Board has moved that the Fourth Circuit address that issue en banc (if the court determines that it is otherwise presented) in *NLRB* v. *D.C. Mason Builders, Inc.*, No. 97-1414 (argued Oct. 31, 1997), and that motion is currently pending. In any event, this petition does not raise any issue concerning the validity of *Deklewa* or the Board's authority to overrule *R.J. Smith*, and, as we discuss below, petitioner would be jurisdictionally barred from raising such a challenge in this Court.

[4] Whether petitioner was free to repudiate its contractual obligations by disregarding them is a separate question from whether petitioner was free to invoke the termination clauses of the "me too" agreements by giving written notice to the

resolved this case under *Deklewa*, petitioner could prevail only if *Deklewa* were invalid or if it were inappropriate to apply *Deklewa* to this case. Petitioner failed to make such a claim before the Board, however, and that failure deprived the court of appeals (and also this Court) of jurisdiction to address any such claim on judicial review. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).[5] Similarly, even in this Court,

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Association and the Union at least 150 days "prior to the then current anniversary date" of the master agreement. Pet. App. 29a; see p. 5, *supra*. Petitioner was contractually entitled to cancel the agreements by giving such notice; it simply chose not to do so.

[5] A copy of petitioner's Exceptions to the ALJ's decision, which it filed on appeal to the Board, has been lodged with this Court. In the court of appeals, petitioner argued that its repudiation of the Section 8(f) agreement was justified under pre-*Deklewa* law. The briefs of the Board (at 37-38, 41 n.10) and of the intervening Union (at 19-21) in the court of appeals argued that 29 U.S.C. 160(e) barred petitioner's reliance on pre-*Deklewa* law because, before the Board, petitioner had never challenged *Deklewa*'s validity or applicability. The court did not address the issue of that jurisdictional bar; instead, it applied pre-*Deklewa* law on the ground that the Fourth Circuit has not adopted *Deklewa*. See Pet. App. 6a n.3; see also note 3, *supra*. Although, in our view, the court should have explicitly rejected petitioner's claims under *Deklewa*, that point is immaterial because, as the court observed, "[t]he result * * * does not change under [either] rationale," *ibid.*, and because petitioner's failure before the Board to make an appropriate argument concerning controlling Board precedent independently justified the court's decision to affirm the Board's unfair labor practice determination and to enforce its order. See *NLRB* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389 (1946) ("Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as

petitioner does not squarely challenge the validity or applicability of *Deklewa*.

In any event, even if pre-*Deklewa* law were applicable to this case, which it is not, any issue relating to that law would not merit this Court's review. For ten years, the Board and the courts have consistently applied *Deklewa* as binding law in adjudicating charges that an employer has engaged in unfair labor practices under Section 8(a)(5) by violating its contractual obligations under a prehire agreement. For that reason, petitioner's claims concerning pre-*Deklewa* law in this context, even if that law were for some reason applicable here, would be of rapidly diminishing practical significance.[6]

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to all issues that were contestable before the Board but were in fact not contested.").

[6] Petitioner claims (Pet. 10-16) that its noncompliance with its statutory obligations was sufficiently flagrant that, under the pre-*Deklewa* regime addressed in *McNeff*, that noncompliance released it from its obligations under the prehire agreements. Even on the assumption that pre-*Deklewa* law were applicable here, the court of appeals' rejection of that claim, as well as its determination (Pet. App. 7a) that petitioner "was bound to the current § 8(f) agreement by virtue of renewal clauses contained in both 'me-too documents,'" were factbound and correct. Moreover, the cases that petitioner cites as evidence of a circuit conflict on the proper application of pre-*Deklewa* law (Pet. 11-16) are factually distinguishable. In none of those cases was there a finding, as here, that the employer had concealed from the union its noncompliance with the prehire agreement. Finally, petitioner cites nothing to support its further contention (Pet. 16-21), which it did not raise below and which the court of appeals did not reach, that its agreement with the Union was "coerced" rather than voluntary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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